

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,

Respondent,

v.

CLAUDE KIRVIN,

Appellant.

No. 56061-1-I

UNPUBLISHED OPINION

FILED: July 3, 2006

PER CURIAM – A jury convicted Claude Kirvin of three counts of unlawful possession of a firearm in the second degree. Kirvin contends the prosecutor committed misconduct in closing argument by misstating the law on constructive possession as defined in the jury instructions. We conclude the prosecutor’s argument was not so flagrant or ill-intentioned that any prejudice could not have been addressed by a curative instruction which Kirvin did not request. We affirm.

FACTS

At approximately 5:20 a.m. on May 12, 2004, the Seattle police executed a narcotics search warrant at Claude Kirvin’s home in Des Moines, Washington. Kirvin’s two-story house has three bedrooms on the second floor – a master bedroom and two smaller bedrooms. The police found Kirvin in one of the small bedrooms. His roommate, Willy Johnson, was in the other small bedroom. No one was in the master bedroom. The police found an Olympic Arms rifle on the floor in the master bedroom

near the bed. They also found a loaded Colt .45 handgun and a wallet containing Kirvin's driver's license and credit cards on top of the nightstand. A small file box containing paperwork, including credit card bills and phone bills in Kirvin's name, was on the floor in the master bedroom. In the kitchen, the police found a loaded handgun, magazines for an assault rifle, and ammunition. A copy of the lease and rental agreement in Kirvin's name was also located in the kitchen.

Kirvin was charged with three counts of unlawful possession of a firearm in the second degree in violation of former RCW 9.41.040(1)(b) and 2(b) (1997). To convict Kirvin of unlawful possession of a firearm in the second degree, the State had to prove he knowingly possessed a firearm and was previously convicted of a felony.

Kirvin admitted the house was rented in his name. Kirvin said he occupied one of the small bedrooms and rented the master bedroom to Willy Johnson and the second small bedroom to another roommate. Kirvin testified that he knew there were three firearms in the house, but said his roommate, Johnson, owned them.

Kirvin testified that before the police arrived on May 12, he was asleep in his bedroom and Johnson was in the master bedroom, but then Johnson came into his room. Kirvin occasionally watched the big-screen T.V. in the master bedroom and said he did not know why his wallet was there. Kirvin stipulated that he had been previously convicted of a felony.

The jury convicted Kirvin on all three counts of unlawful possession of a firearm in the second degree. The trial court sentenced him to twenty-seven months of confinement for each count to be served concurrently.

ANALYSIS

Kirvin contends the prosecutor committed misconduct in closing argument by misstating the law on constructive possession as defined by Jury Instruction No. 10. In defining actual and constructive possession, Jury Instruction No. 10 included the language “dominion and control may be immediately exercised.” Under State v. Howell, 119 Wn. App. 644, 649, 79 P.3d 451 (2003), it is error to include the language “dominion and control may be immediately exercised” in the constructive possession jury instruction for an unlawful possession of a firearm case because it improperly adds another element to the crime.¹ Although the constructive possession jury instruction is erroneous, Kirvin asserts the instruction established the law of the case. We agree. A jury instruction that is not objected to, establishes the law of the case. State v. Willis, 153 Wn.2d 366, 374, 103 P.3d 1213 (2005) (citing State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998)). Here, the State proposed Jury Instruction No. 10 and Kirvin did not object.²

Jury Instruction No. 10, based on 11A Washington Pattern Jury Instructions: Criminal 133.52 (2d. ed. 1994) (WPIC), provides:

Possession means having firearm in one’s custody or control. It may be either actual or constructive. Actual possession occurs when the weapon is in the actual physical custody of the person charged with possession. Constructive possession occurs when there is no actual physical possession but there is dominion and control over the item, and such dominion and control may be immediately exercised. Dominion and control need not be exclusive.³

¹ The Howell court stated that the language “dominion and control may be immediately exercised” should only be used when the State is seeking a deadly weapon enhancement. Howell, 119 Wn. App. at 649 (citing State v. Johnson, 94 Wn. App. 882, 974 P.2d 855 (1999)).

² The defense only objected to the portion of the jury instruction stating “dominion and control need not be exclusive.”

Kirvin contends the prosecutor committed flagrant and prejudicial misconduct in arguing that the jury did not need to find “dominion and control may be immediately exercised” as defined in Jury Instruction No. 10. During closing argument, the prosecutor used a number of different examples to explain constructive possession.

Constructive possession occurs when there’s no actual physical possession but there is dominion and control over the item, and such dominion and control may be immediately exercised. Dominion and control need not be exclusive.

So let’s talk about this. Dominion and control over the item. Think of it this way. If you have a lawnmower in your garage, you have dominion and control over that lawnmower, because you can go out and use it. If you have a car parked in your garage you have the dominion and control over your car. If you are driving your car and your coffee mug is next to you, you have dominion and control over the coffee mug or the dishes in your cupboard or the television remote control. It may not be with you at the time, but it’s in your possession, as the law defines possession. This is the law that the judge has given you, and this is the law you must follow.

In response, Kirvin’s counsel argued:

So, like [the prosecutor] said, this comes down to whether [Kirvin] had constructive possession. Constructive possession occurs when there’s no actual physical possession, but there is dominion and control over the item. And such dominion and control may be . . . immediately exercised. . . . So you’ve got to have immediate access to the item. So if you’re in the north bedroom, you have to have immediate access to the guns. So the gun can’t be in the garage.

The example that [the prosecutor] gave, well if you’re upstairs, and the lawnmower is in the garage, that’s not dominion and control. You have to have immediate access to the guns.

³ WPIC 133.52 provides:

Possession means having a [pistol] [firearm] [dangerous weapon] in one’s custody or control. It may be either actual or constructive. Actual possession occurs when the weapon is in the actual physical custody of the person charged with possession. Constructive possession occurs when there is no actual physical possession but there is dominion and control over the item, and such dominion and control may be immediately exercised. (Emphasis added.)

In rebuttal, the prosecutor said, “[c]ounsel is saying these examples I used of the lawnmower and the remote control, he said, no, it must be able to immediately exercise dominion and control. I’m going to disagree with my colleague because that’s not what the law says.” Kirvin’s counsel did not object to the State’s argument or the examples the prosecutor used to explain constructive possession.

A defendant who alleges improper conduct on the part of the prosecutor must establish that the prosecutor’s remarks were both improper and prejudicial. State v. Finch, 137 Wn.2d 792, 839, 975 P.2d 967 (1999). Any allegedly improper statements must be viewed in the context of the prosecutor’s entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions. State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). Where, as here, there is no objection to the argument below, the claim of error is waived unless the statement is “so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury.” Id. at 561. Prejudice on the part of the prosecutor is established only where “there is a substantial likelihood the instances of misconduct affected the jury’s verdict.” State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995). If the prejudice could have been cured by a jury instruction, but the defense did not request one, reversal is not required. State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994). The absence of contemporaneous objection strongly suggests the argument did not appear critically prejudicial to the defendant in the context of the trial. State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990).

Kirvin contends the prosecutor's "lawnmower" argument misstated the law of constructive possession as defined by the jury instructions and was flagrant and prejudicial misconduct.⁴ The defense theory was that the guns belonged to Kirvin's roommate and were not immediately accessible to Kirvin. By arguing that constructive possession of the gun meant that the gun, like the lawnmower, could be in the garage, Kirvin claims the prosecutor improperly told the jury that they need not find "such dominion and control may be immediately exercised" as required by Jury Instruction No. 10.

Kirvin admitted he rented the house and he knew there were weapons in the house. The police found weapons and ammunition in the master bedroom and the kitchen. There is also no dispute that Kirvin's wallet and personal papers were also found in the master bedroom. As a means of explaining constructive possession in closing argument, the prosecutor used a number of different examples. The examples included the lawnmower in the garage, the coffee mug in the car, dishes in the cupboard, and the television remote control. Even if some of the examples used by the prosecutor were inconsistent with the jury instruction defining constructive possession, in the context of the evidence and the other jury instructions, Kirvin cannot establish prejudice that could not have been obviated by a curative instruction which the defense did not request. Russell, 125 Wn.2d at 85.

In addition, the trial court instructed the jury to disregard any remark, statement or argument that was not supported by the law as "stated by the court."⁵ The jurors

⁴ Kirvin's reliance on State v. Davenport, 100 Wn.2d 757, 675 P.2d 1213 (1984) and State v. Gotcher, 52 Wn. App. 350, 759 P.2d 1216 (1988) is misplaced. In Davenport and Gotcher, the defendants objected at trial to the alleged prosecutorial misconduct.

are presumed to follow the court's instructions on the law. State v. Stein, 114 Wn.2d 236, 247, 27 P.3d 184 (2001).⁶

We conclude Kirvin cannot establish prejudice and affirm Kirvin's conviction for three counts of unlawful possession of a firearm in the second degree.

FOR THE COURT:

Schindler, ACT
Columan, J.
Cox, J.

⁵ Jury Instruction No. 1 states: "The attorneys' remarks, statements and arguments are intended to help you understand the evidence and apply the law. They are not evidence. Disregard any remark, statement or argument that is not supported by the evidence or the law as stated by the court."

⁶ Kirvin cites State v. Brown, 132 Wn.2d 529 and State v. Belgarde, 110 Wn.2d 504, 755 P.2d 174 (1988) for the proposition that even though a defendant fails to object, reversal is required when a prosecutor's remarks are so flagrant and ill-intentioned that the resulting prejudice cannot be cured with an instruction. These cases are distinguishable. In both Brown and Belgarde the alleged prosecutorial misconduct involved the prosecutors' improper appeal to the jury's emotions or prejudice which could not be neutralized by a curative instruction. Belgarde, 110 Wn.2d at 506-507 (prosecutor stated defendant's organization, which could not be neutralized by a curative instruction was comprised of madmen and butchers); Brown, 132 Wn.2d at 568 (prosecutor stated defendant's crime and evil supported imposition of the death sentence).